Alfred E. Ramey v. U.S. General Accounting Office

Docket No.:40-209-17-83

Date of Decision: October 17, 1988

Cite as: Ramey v. GAO (10/17/88)

Before: Kaufmann, Presiding Member

Attorney Fees

DECISION

Introduction

This matter is before the Board on Petitioner's motions to reopen and reconsider the decision of the Presiding Member awarding attorney fees to Petitioner as the prevailing party pursuant to the fee shifting provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. {2000e-5(k), as made applicable to GAO by 31 U.S.C. §732(f). Petitioner was a GS-13 Computer Specialist in Respondent's Accounting and Financial Management Division. In July, 1983, Petitioner was denied a within-grade salary increase, and in December, 1983, Respondent proposed to remove Petitioner from his position. The reason given by Respondent for both adverse actions was because of Petitioner's allegedly unacceptable performance. Petitioner appealed both actions to the Board, and after a full hearing on the merits, the Board entered a decision dated July 10, 1986, finding that the adverse actions taken against Petitioner were taken in retaliation against Petitioner because of his earlier filing of EEO complaints against Respondent and several of Respondent's officials. The Board ordered Petitioner reinstated immediately, with full back pay and benefits.

Throughout Petitioner's appeal before the Board, up to and including the final decision by the Board on the merits of Petitioner's claim, Petitioner was represented by the General Counsel of the PAB. Petitioner was also represented by private counsel, Walter T. Charlton, who has been Petitioner's private counsel since Petitioner filed his original discrimination complaints in 1981, alleging denial of promotion and reprisal. Because of the rules of the Board, where the PAB General counsel elects to represent a Petitioner, the PAB General Counsel is required to direct the litigation, and Petitioner's private counsel is limited to assisting the PAB General Counsel in a manner dictated by the PAB General Counsel. 4 CFR §28.17(e).

Immediately following the Board's final decision on the merits of Petitioner's claim, Petitioner filed a motion for attorney fees in the amount of $279,440.51, plus $1,374.56 in costs. The request was based not only on the fees and costs in connection with Petitioner's claims growing out of the 1983-84 adverse actions, but also for the fees and costs for Petitioner's prior action before the Board in 1981. Additionally, the fee request asked for compensation and costs for several actions filed in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. Petitioner also requested a multiplier of 50% as incentive for the results obtained.

The Respondent filed an opposition to Petitioner's request for fees and costs, and essentially argued that Petitioner should be awarded fees only for those hours expended by his counsel during the pendency of Petitioner's 1983 complaints in the administrative process, up to the time the PAB General Counsel began

his investigation of Petitioner's claims. Respondent contended that the Board was without jurisdiction to award Petitioner fees for any of Petitioner's federal court actions, and further, that Petitioner was entitled to no fees after the PAB General Counsel agreed to represent Petitioner before the Board. Respondent also argued that the hourly rate requested by Petitioner ($150) was excessive, given the circumstances of the case, and that the enhancement award was unwarranted. Thereafter, Petitioner filed a motion for a supplemental award of $10,927.22 in fees and costs for counsel's work in preparing his attorney fee request. Petitioner also amended his original fee request downward to $247,492.73.

The issue of Petitioner's fees was vigorously litigated before the Presiding Member. Numerous motions were filed, including cross motions to compel, and a motion by Respondent for partial dismissal on jurisdictional grounds. The Presiding Member heard oral arguments on several of the motions, and immediately after the oral arguments, Petitioner's counsel retained counsel to represent him in the litigation of his fee request. Additional pleadings were filed on Respondent's motion for partial dismissal, and the Presiding Member then granted Respondent's motion for partial dismissal, striking all claims that did not directly relate to hours spent litigating the issues resolved by the Board in our July 10, 1986 decision.

The formal evidentiary hearing on Petitioner's request for attorney fees began on December 16, 1986, and continued until January 5, 1987, consuming a total of five days in the process. During the interim, Petitioner submitted two more corrected versions of his abstract of hours claimed for the purpose of his fee award. Petitioner's final request for fees was in the amount of $187,378.50 and his final figure for costs claimed was $967.71. The law firm of Fitzpatrick and Verstegen, who litigated the fee award for Petitioner submitted a request in the amount of $20,986.00 in fees and $1,827.53 in costs for its representation of Petitioner on the fee litigation.

THE PRESIDING MEMBER'S DECISION

The Presiding Member grounded his decision on the resolution of three primary issues. First, whether Petitioner could be compensated for fees and costs incurred by Petitioner's private counsel during the time Petitioner was represented by the PAB General Counsel. Second, if Petitioner should be entitled to attorney fees while represented by the PAB General Counsel, what would be the reasonable hourly rate for the services of Petitioner's private counsel. Finally, the Presiding Member had to determine the number of hours that were reasonably expended by Petitioner's counsel on the litigation before the Board.

On the threshold matter, the Presiding Member found that Petitioner was the prevailing party for the purposes of attorney fees, a matter that was not in dispute. However, the Presiding Member reiterated his earlier ruling on Respondent's motion for partial dismissal, holding that Petitioner was not entitled to fees for the work of his counsel on his 1981 complaint wherein Petitioner claimed to have been denied a promotion because of his age and sex. The Presiding Member found that, not only were the subject matters of the instant claim and the 1981 action different, but that the earlier action had been disposed of by a final decision of the Board, including an award of attorney fees. Since the Petitioner took no appeal from the Board's decision, the Presiding Member found that there was no basis upon which he could review the prior Board order.

The Presiding Member also made a finding that Petitioner's action in the United States District Court was sufficiently unrelated to the instant action that Petitioner's only entitlement to fees for work in that forum would have to result from an order of the District Court, itself. With respect to Petitioner's litigation in the

U.S. Court of Appeals for the District of Columbia Circuit, the Presiding Member found that Petitioner was not a prevailing party for the purpose of that proceeding, and further, the Court of Appeals had already denied Petitioner's request for fees for time spent litigating in that forum. The Presiding Member also denied Petitioner's request for fees relevant to Petitioner's motion for an order enforcing the Board's final decision on the merits. The Presiding Member denied the fee request on the basis that, since the Board denied Petitioner's motion for enforcement, Petitioner was not the prevailing party for the purposes of the motion, and hence, could not be compensated for those services.

The Presiding Member thus ruled that, for the purposes of Petitioner's 1984 reprisal claim, Petitioner was the prevailing party entitled to attorney fees, and since the Board regulations recognize a role for private counsel--subject to the direction of the PAB General Counsel--Petitioner should be compensated for the services of his private counsel.

The Presiding Member then went on to calculate the reasonable fee to be awarded to Petitioner for the work of his private attorney in assisting the PAB General Counsel in the litigation of Petitioner's claim before the Board. The Presiding Member began by closely scrutinizing the final abstract of hours submitted by Petitioner's counsel. The Presiding Member adjusted those hours downward to eliminate any hours that were, based on his analysis and judgment, excessive, redundant, or otherwise unnecessary. The Presiding Member also eliminated all hours spent on claims for which the Petitioner did not prevail. Of the total of 867.5 hours for which Petitioner requested compensation, the Presiding Member found 416.63 to be reasonably expended on the litigation before the Board.

Having determined the number of hours for which Petitioner should be compensated, the Presiding Member then selected the appropriate hourly rate at which counsel should be compensated. Petitioner requested an hourly rate of $100 for time expended by counsel prior to July 13, 1983, and $150 per hour for all time expended subsequent to that date. The Presiding Member first determined that the prevailing market rate in the Washington, D.C., community for experienced civil rights litigators is $150 per hour. All parties, including Petitioner's counsel, agreed that Petitioner's counsel is not an experienced civil rights litigator, and therefore, Petitioner's counsel could not claim the prevailing hourly rate for experienced civil rights litigators.

The Presiding Member gave even greater weight to the fact that Petitioner's counsel was not the chief counsel for the litigation before the Board, but, in fact, functioned more akin to an associate counsel for the PAB General Counsel. Finally, the Presiding Member considered the regular billing rates of Petitioner's counsel. The Presiding Member found that Petitioner's counsel's regular billing rates fluctuated between $55 and $100 per hour.

After considering all of the evidence, and weighing all of the factors, the Presiding Member determined that Petitioner's counsel was entitled to an hourly rate of $75.00. Applying that rate to the 416.63 hours which the Presiding member determined were reasonably expended on the litigation, he gave Petitioner a lodestar figure of $31,247.25, in attorney fees for the litigation of the merits of his case. The Presiding Member awarded Petitioner the entire amount of costs requested, $967.71. The Presiding Member awarded Fitzpatrick & Verstegen $19,785 in fees and $1,827.53 in costs for their work in litigating Petitioner's attorney-fee request.

II. PETITIONER'S MOTION TO REOPEN AND RECONSIDER

There are actually two separate motions to reopen and reconsider the decision of the Presiding Member as regards Petitioner's attorney's fees. Walter Charlton, Petitioner's counsel for the hearing on the merits of his Board appeal, has filed a motion to reopen and reconsider the decision of the Presiding Member as regards his fee award. Likewise, Fitzpatrick and Verstegen have filed a separate motion to reopen and reconsider the Presiding Member's determination of their fee award for litigating Petitioner's fee request. Because the motions are based on entirely different considerations, we will consider them separately.

A. Petitioner's Fees on the Merits

Petitioner contends that the Presiding Member erroneously applied the law governing attorney fees in determining Petitioner's fee award, for the following reasons:

1. The amount awarded is inimical to the purposes of the attorney fee provisions of Title VII.

2. Counsel's time records are accurate and contemporaneously recorded.

3. Petitioner substantially prevailed, and proved that there was an ongoing conspiracy to deprive Petitioner of his civil rights.

4. The Presiding Member applied the wrong standards in computing the number of hours reasonably expended by Petitioner's counsel.

5. The Presiding Member was biased against Petitioner's counsel.

ANALYSIS

Although various factors may obtain in calculating attorney fees, the determination is primarily a matter committed to the discretion of the trier of fact. Blum v. Stenson, 465 U.S. 886, 896 (1984); Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). The findings of the Presiding Member with regard to the reasonable hourly rate and the hours reasonably expended can be reversed only if we find an abuse of that discretion. Hensley v. Eckerhart, supra; Copeland v. Marshall, 641 F.2d 880, 901 (D.C. Cir. 1980)(en banc). In the District of Columbia, the reasonable hourly rate for an attorney in civil rights litigation is based primarily on the customary billing rate of that attorney. Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 24 (D.C. Cir. 1984). The question of an attorney's marketplace billing rate is a factual question subject to a clearly erroneous standard of review. Black Grievance Committee v. Philadelphia Electric Co., 802 F.2d 648, 652 (3rd Cir. 1986); Blum v. Stenson, supra. The burden is on the prevailing attorney to justify the rate requested. Blum v. Stenson, 465 U.S. at 896-97, n.11; Laffey v. Northwest Airlines, Inc., 746 F.2d at 16-17, n.81.

Petitioner argues that the fee amount awarded to his counsel by the Presiding Member is so low as to be inimical to the purposes of the attorney fee provisions of Title VII, and that the most important considerations in computing the fee award are that Petitioner is the prevailing party and that counsel's time records are accurate.

As a threshold matter, we agree that a Petitioner must be the prevailing party in order to recover an attorney fee under Title VII. One may be considered a prevailing party if he succeeds on any litigation issue which is significant in achieving some of the benefits sought by the parties in bringing the suit. Hensley v. Eckerhart, 461 U.S. at 433. Petitioner contends that, having prevailed in his action before the Board on the merits of his claim for reprisal in the 1983 adverse actions, he should be compensated for all other legal actions, administrative and judicial, growing out of any other personnel problems he had with Respondent. The Presiding Member found that he was without jurisdiction to award Petitioner fees for hours expended by counsel for any subject matter except that of the 1983 actions, including Petitioner's actions before the federal courts. We agree. Petitioner's earlier action, his discrimination complaint for denial of promotion, was fully adjudicated before this Board, after which a final decision was entered disposing of both the merits of Petitioner's case, as well as his request for attorney fees. We can find no basis in law or fact to continue to indulge Petitioner's attempts to resuscitate what is by now a long-dead issue. The Presiding Member correctly ruled that Petitioner's failure to take any appeal from the Board's decision on his promotion complaint and concomitant attorney fee petition removed that matter from any further consideration by this Board. We find that Petitioner's earlier Board appeal and subsequent federal court actions are a series of discrete claims, and counsel's work on those claims is unrelated to his work on the instant matter. See Hensley v. Eckerhart, 424 U.S. at 434-35.

We are also satisfied that the Presiding Member's factual findings with regard to the hourly rate computed for Petitioner's counsel is not clearly erroneous, and that the rate awarded does not represent an abuse of the Presiding Member's discretion. The Presiding Member based his determination of the appropriate hourly wage for Petitioner's counsel on several considerations, all of which we find relevant and valid for that purpose. The evidence regarding Petitioner's counsel's billing rate shows figures between $55 and $100. The figure settled on by the Presiding Member--$75--is a reasonable figure in our view. Moreover, the other factors considered by the Presiding Member--counsel's experience in civil rights, the role of counsel in the litigation, and the prevailing market rate--all lend credence to the finding of the Presiding Member as regards the appropriate hourly rate to be awarded to counsel. It is undisputed that the PAB General Counsel was the lead counsel in this matter, and that Mr. Charlton's role was subordinate to the General Counsel for the purposes of the appeal. It is also clear from the record that the PAB General Counsel prepared all of the major pleadings in the case, and performed the lion's share of the litigation at hearing. Given Mr. Charlton's subordinate role in the litigation, we see no reason to disturb the Presiding Member's finding of $75 as an appropriate hourly rate.

Nor do we find the accuracy of counsel's time records to be dispositive in settling on the proper amount of the fee award. Rather, the critical issue regarding counsel's time is whether or not the number of hours claimed by counsel are hours that have been reasonably expended on the litigation. Hensley v. Eckerhart 435 U.S. at 434. Proper billing judgment requires counsel to exclude all hours that are excessive, redundant, or otherwise unnecessary to the litigation. Id. With respect to the Presiding Member's determination of the number of hours for which counsel is to be compensated, we are convinced that the Presiding Member's evaluation of the hours to be counted towards counsel's lodestar figure is based on an extensive inquiry into the time expended and the reasonableness of those hours based on the factors enunciated in Hensley v. Eckerhart, supra, and Copeland v. Marshall, supra. However, we do find some findings in this regard that are not supported by the record evidence.

The time records for Petitioner's counsel show counsel as having spent ten (10) hours per day on both March 26 and 27, 1985, preparing for the hearing and attending the hearing. The Presiding Member awarded counsel only 2-1/2 hours per day for the tasks. Although counsel's time records of his activity for

March 26-27 are written very ambiguously, our review of the hearing transcript shows that counsel was in attendance at the hearing both days, and was actively involved in examining witnesses on both of the days in question. On the basis of this evidence, we find that the record does not support the Presiding Members's finding that counsel's expenditure of time for these two days is excessive. Accordingly, we reverse the decision of the Presiding Member as to the computation of counsel's hours for work performed on March 26-27, 1985, and accept the ten hours per day claimed.

We find Petitioner's other arguments in support of reconsideration to be without merit. There is no evidence that the Presiding Member exhibited any bias towards Petitioner's counsel in excluding certain of the requested hours as being unreasonable. In reviewing the Presiding Member's factual findings for an abuse of discretion, we find that the Presiding Member took into account the proper and relevant considerations in determining the reasonableness of the hours for which Petitioner requested compensation.

The fee applicant bears the burden of persuasion on the number of hours to be counted towards the lodestar calculation, and Petitioner offers nothing to persuade us that the Presiding Member's factual findings are erroneous or otherwise unsupported by the weight of the record evidence. Nor do we find relevant the number of hours expended by opposing counsel in the litigation. The Presiding Member was justified in making his determinations of the number of hours to be included in the lodestar on the basis of the evidence, or lack thereof, offered by Petitioner in support of his requested hours. However, it would not have been an abuse of discretion for the Presiding Member to have made a wholesale deduction in the lodestar hours and hourly rate without performing an item-by-item accounting of Petitioner's time records. Copeland v. Marshall, 641 F.2d at 903; Gagne v. Maher, 594 F.2d 336, 344-45 (2nd Cir. 1979), aff'd, 448 U.S.122 (1980).

Petitioner's remaining contentions are equally unpersuasive and wholly groundless, and we address them seriatim.

The amount of the fee award to Petitioner is in no way inimical to the purposes of the attorney fee provisions in Title VII. Fee-shifting statutes are designed to attract competent counsel to ensure that persons with civil rights grievances have access to the judicial process. The are not designed to provide windfalls to attorneys. City of Riverside v. Rivera, 477 U.S. 561, 580 (1986) (citing Senate Report No. 94-1011, p. 6 (1976)). The standards for attorney's fees set by Congress and the courts exist to ensure that attorneys are compensated only for the time they have reasonably expended on a case. Ibid. For that reason, we do not think Petitioner's fee award herein violates the letter or spirit of the fee-shifting statutes.

Petitioner's persistent urgings that the lodestar fee be adjusted upward is similarly misplaced. As a matter of law, the lodestar may not be adjusted upward to compensate for delay where the defendant is the U.S. Government. Library of Congress v. Shaw, 478 U.S. 310 (1986). Nor may such factors as complexity of the issues, quality of representation, and results obtained serve as independent bases for increasing the lodestar. Blum v. Stenson, 465 U.S. at 989-901. As long as the fee award is based on considerations relevant to determining a reasonable number of hours and a reasonable hourly rate, the attorney is presumed to have been adequately compensated. Pennsylvania v. Delaware Valley Citizens for Clean Air, 106 S.Ct. 3088, 3098 (1986).

CONCLUSION

For the foregoing reasons, we affirm the Presiding Member's award of attorney's fees and costs to Petitioner for the work of Walter T. Charlton--with the exception of the specific findings reversed above. As to those findings involving the hours expended on March 26-27, 1985--we think a remand would only further delay these proceedings unnecessarily. Therefore, we order that the Presiding Member's decision is affirmed, except that the lodestar amount for Petitioner's fees is to be amended to include the total of 15 hours erroneously denied Petitioner for his work on the March 26-27, 1985, matters. Thus, the lodestar amount for Petitioner's counsel Charlton is now $32,375.25. The amount of costs remains the same.

B. Petitioner's Fees for Fitzpatrick & Verstegen

Petitioner also moves the Board to reopen and reconsider the Presiding Member's decision regarding counsel fees for Fitzpatrick & Verstegen, the firm which litigated Petitioner's fee petition before the Presiding Member. Petitioner bases his motion on two primary contentions: (1) the decision of the Presiding Member inadvertently failed to award Petitioner fees and costs associated with work performed subsequent to the close of the hearing record, and (2) the Presiding Member abused his discretion by failing to award fees to Fitzpatrick & Verstegen at their normal hourly billing rates. Petitioner also requests fees and costs for the time necessary to prepare the motion to reopen and reconsider.

After reviewing the record below, we think a remand to the Presiding Member is the best course of action. The remand is occasioned because of several considerations. First, it is undisputed that the Presiding Member did omit to consider the fees and costs requested by Fitzpatrick & Verstegen for services rendered between February 18, 1987, and March 2, 1987. Also, the record evidence indicates that Petitioner provided evidence of Fitzpatrick & Verstegen's historical billing rate. Since the presumptively-reasonable lodestar hourly rate for attorneys is their customary billing rate, Laffey v. Northwest Airlines, Inc., 746 F.2d at 18, we also remand this issue to the Presiding Member for consideration of the Laffey factors. See Thompson v. Kennickell, 836 F.2d 616 (D.C. Cir. 1988). Finally, we instruct the Presiding Member to also consider whether a further award of fees and costs is justified for the services of Petitioner's counsel on the motion to reopen and reconsider.